

SUPREME COURT OF NIGERIA
21ST MAY, 2004. SC. 259/2001
CORAM:- S.A. BELGORE, U. MOHAMMED, S.U. ONU,
N. TOBI, D.O. EDOZIE, JJSC

1. JACOB BOLAJIADELUSOLA
2. LASISI OLADAPO
3. JIMOH AINA PLAINTIFFS/
4. JEREMIAH OLABISI APPELLANTS

5. PAULAJAYI
(For themselves and on behalf of
Akowonwado Family)

AND

1. JOSEPH OLADIRAN AKINDE
2. GABRIEL AKINDE DEFENDANTS/
3. EMILY IBIYEMI AKINDE RESPONDENTS
4. JEREMIAH AKINDE

APPEALS - Ground of appeal - Competence of - Omnibus ground in a
civil case - Framed as if in a criminal case - Is incompetent (H1)

APPEALS - Issue for determination - Competence of - Contention that
issue 2 - Is not derived from any ground of appeal - Is misconceived
(H2)

APPEALS - Brief writing - Issues - It is against the practice - For one
ground of appeal to be split into two issues - Supreme Court can re-
frame the issues (H3)

ACTIONS - Claim - Land matters - To ascertain the exact claim of a
plaintiff - Writ of summons, entire statement of claim and plans filed -
Will be examined (H4)

COURTS - Substantial justice - Being the interest of the court - Inelagantly

formulated claim - Will not be allowed to defeat justice (H5)

LAND LAW - Title - Identity of land claimed - Burden of proof is on the plaintiff - But it will not arise - Where identity was never in issue (H6)

ACTIONS - Non-suit - Land matters - Claim - On which the parties joined issue - Where there is concurrent finding against defendants - Non-suit order is not justified (H7)

LAND LAW - Title - Injunction - Boundaries - Where both parties know the land in issue - Refusal to grant injunction and title - Is misconceived (H8)

FACTS

Before the Ogun State High Court, Abeokuta, plaintiffs/appellants filed an action against the defendants/respondents. They claimed declaration of entitlement to right of occupancy, damages for trespass and an injunction restraining further acts of trespass on the disputed land.

Plaintiffs relied on traditional evidence to establish their case. They showed how their ancestor settled on the land about 200 years ago, and how they gave portion of their land to the defendants' ancestor. The present dispute erupted because defendants encroached beyond where they were given by trying to build a church without obtaining the plaintiffs' permission.

Defendants denied plaintiffs' claim. Rather, relying on traditional evidence, they sought to establish how the land originally belonged to their ancestor. The trial court at the end the hearing found in favour of the plaintiffs. Defendants appealed to the Court of Appeal which affirmed the findings of facts made in favour of the plaintiffs with respect to their traditional history . But that court non-suited the plaintiffs on the ground that the area of land claimed in their writ of summons was not identifiable. Being dissatisfied, plaintiffs have now appealed to the Supreme Court.

ISSUE FOR DETERMINATION

“Whether the learned justices of the Court of Appeal were justified in setting aside the judgment of the trial court and non-suited the plaintiffs/appellants.”

HELD (Unanimously allowing the appeal per **EDOZIE JSC**)

Ground of appeal - Competence of

1. It is judicially recognised that an omnibus ground of appeal in a criminal case is differently drafted from such a ground of appeal in a civil case. In a criminal case the essence of such a ground is that there is no evidence to support the verdict and therefore the omnibus ground in a criminal case is framed thus – *“the verdict or judgment is unreasonable and cannot be supported having regard to the evidence”*.

In civil cases which are decided on the basis of preponderance or balance of evidence, the omnibus ground of appeal is simply that – *“the judgment is against the weight of evidence”*. However, it has been held that it is unobjectionable if such a complaint is couched as – *“the judgment is unreasonable, unwarranted and cannot be supported having regard to the weight of evidence.”* In the case under consideration, ground 2 of the grounds of appeal already set out is for ease of reference repeated hereunder as follows:-

“2 The order is unreasonable and unwarranted having regards (sic) to the facts.”

On the authorities cited above, I agree with learned counsel for the defendants/respondents, that the ground as couched is more appropriate in a criminal than in a civil case. It is incompetent as it contravenes Order 8 rule 2 (4) of the Supreme Court rules. It is accordingly struck out. (p. 1424 G)

APPEALS - Issue for determination

2. With respect to the second arm of the objection relating to the second issue for determination, it is, no doubt, a correct statement of law that an issue for determination in an appeal which is not related to or derived from any of the grounds of appeal challenging the judgment appealed against is incompetent and must be discountenanced together with argu-

ment advanced thereunder in the consideration of the appeal. Authorities in this regard are legion and they include Okpala v. Ibeme (1989) 3 S.C. (Pt.1) 61. In the case in hand, I am of the view that it is a misconception on the part of learned counsel for the defendants/respondents to contend, as he did, that the second issue for determination is not related to any of the grounds of appeal. (p. 1425 E)

APPEALS - Brief writing - Issues

C 3. A careful perusal of the first ground of appeal reveals that it is a complaint against the order non-suiting the plaintiffs/appellants, and made in substitution of the order of right of occupancy and injunction decreed in favour of the plaintiffs/appellants by the learned trial Judge. It therefore stands to reason that a complaint in ground one against the order of non-suit encompasses both the first issue for determination relating to declaration of title as well as the second issue dealing with the grant of injunction. Since it is against the practice of brief writing for one ground of appeal to be split into two issues, it would have been more appropriate D for only one issue to be distilled from the first ground of appeal. Accordingly, I will merge and re-frame the 1st and 2nd issues. (p. 1426 A)

ACTIONS - Claim - Land matters

F 4. To ascertain the exact claim of a plaintiff in a suit, one generally must have recourse to the writ of summons and the claim as endorsed in the Statement of Claim., But just as in determining whether an averment in a particular paragraph of a Statement of Claim is traversed, one is not limited to a particular paragraph of the Statement of Defence but to the G entire defence for which see Pan African Co. Lt. V. National Insurance Co. (Nig.) (1982) 9 S.C. 1, so by way of analogy, to ascertain the plaintiffs' claim, it is necessary to examine not only the writ of summons or the claim portion of the statement of claim but also other paragraphs of H the Statement of Claim as well as plans filed along with the Statement of Claim. (p. 1427 A)

COURTS - Substantial justice

5. Though the claim of the plaintiffs/appellants was inelegantly formulated, the attitude of the courts nowadays is to do substantial justice without undue adherence to technicalities. Justice can only be done if the substance of the matter is examined. Reliance on technicalities leads to injustice. See Nishizawa v. Jethwani (1984) 12 S.C. 231 at 279. (p. 1430 A) B

Title - Identity of land claimed

6. As learned counsel for the plaintiffs/appellants correctly stated, parties did not properly join issue on the identity of the land claimed by the plaintiffs/appellants. A plaintiff seeking a declaration of title to land has the primary duty or burden to prove clearly and unequivocally the precise area to which his claim relates. But that burden will not arise where the identity of the land in dispute was never a question in issue. That issue will only arise where the defendant raises it in his Statement of Defence: See Ezeudu v. Obiagwu (1986) 2 NWLR (Pt.26) 208. The main issue that arose for resolution by the trial court was which of the parties proved a better title based on their competing traditional histories. (p. 1430 C) C
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Non-suit - Land matters

7. As I had pointed out earlier, from the writ of summons read in conjunction with the statement of claim including the survey plan Exhibit “B” it is plain to me that what the plaintiffs/appellants were claiming and upon which both parties joined issue was the land in dispute clearly delineated red in Exhibit “B”. It is that claim that the defendants/respondents defended and not just the yellow verge in Exhibit “B” and the concurrent findings of the two lower courts is that they are not entitled to that land. A non-suit is appropriate where there is no satisfactory evidence enabling the court to give judgment to either of the parties and wronging neither: See African Continental Bank v. Yesufu (1980) 1-2 S.C. 48. Since both courts below had decided that the plaintiffs/appellants established their title to the land in dispute, an order of non-suit cannot be justified. Having opined that the plaintiffs’/appellants’ claim related to the entire land in F
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dispute verged Red in Exhibit “B” and that both parties fought and contested the action on that footing with the concurrent findings of the two lower courts in favour of the plaintiffs/appellants which findings have not been appealed against let alone faulted, it is my judgment that the order of the court below non-suiting the plaintiffs/appellants was misconceived and erroneous. (pp. 1432 B / 1434 B)

Title - Injunction - Boundaries

8. An injunction can only be granted and binding when the boundaries of the area or areas to be affected are ascertained, well known and properly described.

In the case in hand, the court below was of the view that the land in Ore that gave rise to the dispute between the parties was not identifiable hence it refused to grant a declaration of right of occupancy of that area in favour of the plaintiffs/appellants even though it was satisfied that they had proved their entitlement thereto. It is conceded that the land in question was not demarcated by pillar beacons but it is edged yellow in Exhibit “B” depicting certain features that is, the church under construction. That church building is also reflected in Exhibit “C”, the defendants/respondents plan. Undoubtedly, both parties know the land in question. Exhibit “B” was drawn to scale and there is no evidence on record that a Surveyor using the scale of the plan orientated at an origin indicated as O.N.N.O. cannot locate the yellow verge on Exhibit “B”.

In the case of Amata v. Modekwu (1954) WACA 580 where a plan used in a previous suit in a claim for rent for farming was tendered in a subsequent suit for title, there was evidence that the plan was inaccurate and evidence so unsatisfactory that no judgment could be founded on it. There was no such evidence in the instant case. For this reason, I am of the opinion that the court below was in error to have set aside the order of injunction made by the trial court. For this same reason, too, it was in error to have refused to grant right of occupancy to the plaintiffs/appellants in respect of the yellow verge which according to it was the area claimed in the writ of summons. (p. 1433 C)

NOTABLE POINTS OF INTEREST**EDOZIE JSC***1. Counsel is to confine himself to his client's case*

With due respect to counsel, the persons or descendants of Akinde referred to have not complained. The defendants/respondent were sued in their personal capacity and it behoves counsel to confine himself to the case of his clients and not to offer unsolicited defence to parties who did not consult him. If those parties were aware of the case and decided not to be joined in the suit that is entirely their problem. Besides, if those parties were granted land as customary tenants, radical title still resides in the plaintiffs/appellants entitling them to the declaration of customary right of occupancy granted in their favour. (p. 1432 G)

TOBI JSC*2. Non-suit - Purpose of - When to be granted*

Where a plaintiff fails to adduce sufficient evidence on a crucial point in the matter, and where the state of evidence does not entitle the defendant to judgment, the proper order to make is one of non-suit. See Ode v. Trustees of Ibadan Diocese (1966) 1 All NLR 287. The order of non-suit is to be granted where a plaintiff has only failed to get judgment on account of a mere technical hitch of which the defence is not, in the opinion of the court, entitled to take an advantage. See Odiote v. Okotie (1972) 6 S.C. 83; Ogunloye v. Durosinmi (1975) 12 S.C. 49; Okpaloka v. Umeh (1976) 9-10 S.C. 269.

Where in a claim of declaration of title to land the plaintiff proves ownership of only a portion of the land claimed, the proper order to make is one of non-suit. See Ejiofor v. Onyekwe (1972) 12 S.C. 171. Non-suit may not be granted where a claim for declaration of title to land fails because the boundaries of the land are not ascertained; but where there is evidence that the plaintiff owns a part of the land the whole of which he failed to ascertain, non-suit may be granted. See Epi v. Aigbedion (1972) 10 S.C. 53. An order of non-suit should not be made when the effect of such order would be to penalise a plaintiff who maintained a continued consistency both in his pleadings and by the evidence in support thereof.

See Ekpenyong v. Ayi (1973) 5 S.C. 169. (p. 1435 B)

REPRESENTATION

N.O.O. OKE, (WITH HIM, O.T. AKINBUJI), FOR APPELLANTS.

B ADEBAYO ADENIPEKUN, FOR RESPONDENTS.

CASES REFERRED TO

Okaroh v. State (1990) 1 SCNJ 124 AT 130

C Dr Okonjo v. Dr. Odje & Co. (1985) 10 S.C. 265 - 268

G.B. Ollivant Ltd. v. C.A. Vanderpuye (1964) 2 WACA 368 at 372

Nwosu v. Imo State Environmental Sanitation Authority (1990) 2 NWLR (Pt. 135) 688 at p. 717. Shuaibu v. Nigeria –Arab Bank Ltd. (1998) 4 S.C. 170

D (1998) 5 NWLR (Pt. 551) 582 at 596

Fatuade v. Onwoamanan (1990) 2 NWLR (Pt.132) 322

Olagbemiro v. Ajagungbade (1990) 3 NWLR (Pt. 136) 37

Anthony Idesola & Anor v. Chief Paul Ordia (1997) 3 NWLR (Pt.491) 17

E at p. 29

Epi v. Aigbedion (1972) 10 S.C. 53, (1972) 1 AII NLR (Pt.2) 370

Baruwa v. Ogunshola & Ors. 4 WACA 159

Omoregie v. Idugiemwgnye (1985) 2 NWLR (Pt.5) 41

F Titiloye v. Olupo (1991) 7 NWLR (Pt. 205) 519

LEAD JUDGMENT BY EDOZIE JSC

G The plaintiffs/appellants in suit No. HCL/26/83 filed at the Abeokuta High Court in Ogun state commenced proceedings culminating in this appeal against the defendants/respondents from whom they sought a declaration of right of occupancy over an area of land, N200 damages for trespass and an injunction restraining further acts of trespass on the disputed land. From their pleadings and evidence in support thereof, the H plaintiffs/appellants relied on traditional evidence to establish their case. According to them, the vast track of land edged red in their survey plan admitted in evidence as exhibit B, belonged to Akowonwado their ancestor who migrated from Ile-Ife to settle on the land about 200 years ago.

Their said ancestor Akowonwado first settled on a portion of the vast land known as Ilase and then at Oko-omi also within the land. He exercised acts of possession and ownership by farming, building and hunting thereon without interference by anybody. Upon his death, all his landed properties including the portion now the cause of the dispute which is B edged yellow in the survey plan Exhibit B were inherited by his children namely, Latorikan, Oyikilu, Ookala, Dada Agbobalaya, Ejibosa, Agedu and Aajoye. These children spread all over the entire land and founded a number of villages such as Ore later called Ore-Akinde founded by C Laforikan, Okorulepupo formerly known as Oko Ilase founded by Oyekilu, Erinle village founded by Erinle son of Talabi and Ikemo founded by Ookola who begat Ajayi Aga and Aina Eru. It was the case of the plaintiffs/appellants that the defendants/respondents were descendants of D Ogunyemi who fled from Ilaro as a result of the death of many of his children.

He fled with one surviving child called Akinde with his mother to Ore village where they stayed with Onitan his friend. After Ogunyemi's death, Akinde continued to stay in Ore village, which later became Ore E Akinde because of the popularity of Akinde as an Ifa priest. Akinde was given a portion of the land belonging to Ajayi Aga and Aina Eru the children of Ookola for farming purposes. The descendants of Akinde are still in occupation of that portion of land. The plaintiffs/appellants further F alleged that no portion of the entire land inherited by the descendants of their great ancestor Akowonwado had been sold and nobody entered any part of their land without the permission of members of their family. The present dispute erupted because the defendants/respondents encroached G beyond where they were given by trying to build a church without first obtaining permission from the plaintiffs/appellants' family.

By their own pleadings and evidence proffered in support thereof, the defendants/respondents denied the plaintiffs/appellants' claims and traversed their main allegations. Ostensibly relying on traditional evidence, H they equally lay claim over the land in dispute. According to them, their great ancestor Ogunyemi came from Ilaro. He and Aina Akaraki were the first settlers in Mede which later became known as Oko-omi. Ogunyemi

lived and died there and thereafter one of his three sons, Akinde moved to the place now known as Ore Akinde, which he founded. The descendants of Akinde continued to exercise acts of ownership over Ore Akinde where they built houses and constructed roads without any let or hindrance nor permission from anybody. Finally, the defendants/respondents admitted erecting a church building at Ore Akinde without seeking the consent and permission of the plaintiffs/appellants asserting that the land in Ore Akinde and its environs marked 'B' and edged red in their survey plan admitted as Exhibit 'C' belongs to the defendants/respondents' family.

After due summarization and evaluation of the evidence of the parties, the learned trial Judge, Sofolahan, J., on 15th November, 1990, upheld the traditional evidence of the plaintiffs/appellants adjudging them entitled to the customary right of occupancy over the area edged red in their plan Exhibit 'B' and an injunction against the defendants/respondents with respect to the yellow verge in the said plan Exhibit .B'. Dissatisfied with the outcome of the proceedings at the trial court, the defendants/respondents lodged an appeal to the Court of Appeal, Ibadan Judicial Division, which court in its judgment of 30th April, 2001, though affirming the findings of facts made in favour of the plaintiffs/appellants with respect to their facts made in favour of the plaintiffs/appellants with respect to their traditional history, nonetheless non-suited the plaintiffs/appellants on the ground that the area of land which they claimed on their writ, to wit, "*an area of land situate, lying and being at Ore village via Uju Otta, Ogun Sate*" was not identifiable.

It is against that judgment of the Court of Appeal non-suited the plaintiffs/appellants that they, the plaintiffs/appellants, have brought this appeal predicated same on a notice of appeal containing two grounds of appeal.

Having regard to the preliminary objection raised by the defendants/respondents, I propose to set out the two grounds of appeal short of their particulars. They read as follows:-

"Grounds of Appeal

1. *The court below misdirected itself in law in its order non-suited*

the plaintiffs'/respondents' case after all the concurrent findings of fact particularly where it stated-

"The only technical hitch that prevented the plaintiffs/respondents from having judgment was the disparity between their claims as framed (sic) and the area of land they successfully proved as their own. There is not doubt therefore that it will be totally inequitable for their claim to the dismissed. I believe that from the facts established in this case, this is case in which an order of non-suit ought to be made"

2. The Order is unreasonable and unwarranted having regards (sic) to the facts."

In the appellants' brief of argument, learned counsel for the plaintiffs/appellants raised two issues for determination, viz:-

"1. Whether the Court of Appeal's approach to the plaintiffs' claims was right in law that the trial court was wrong when it granted the plaintiffs judgment for declaration of title to the entire area of land verged 'Red' in their survey plan exhibit B on the view that their claim was limited to an area of land named "Ore village" as endorsed on the Writ of Summons.

3. Whether the approach of the Court of Appeal was right in setting aside the judgment of the trial court on the order of injunction granted on the view that that area to be covered by the order of injunction was not strictly defined."

The defendants/respondents at paragraph 3.1 of their brief raised a preliminary objection to the following effect-

"(1) Ground two of the grounds of appeal in the notice of appeal is incompetent and the same should be struck out.

(2) Issue two formulated by the appellants in their brief of argument is not based on any ground of appeal and it is incompetent and it should be struck out and the argument based on the same should be discountenanced."

Expatriating on the objection, learned counsel for the defendants/respondents referred to Order 8 rule 2(4) of the Supreme Court rules which provides that-

"No ground which is vague or general in terms or which disclosed

no reasonable ground of appeal shall be permitted save the general ground that the judgment is against the weight of evidence, and any ground of appeal or any part thereof which is not permitted under this rule may be struck out by the court of its own motion or on application by the respondent.” and submitted that ground 2 of the grounds of appeal is general in terms and at the same time not framed in the exceptional manner permitted by the Supreme Court rules. Citing the case of Mogaji v. Odofin (1978) 4 SC.91 at 93-95, it was submitted that the omnibus ground of appeal permitted under Order 8 rule 2 (4) of the Supreme Court rules which is a challenge on the weight of evidence is not the same thing as an allegation that judgment or order is “unreasonable” or “unwarranted” which postulates that there is no evidence at all in support of the judgment appealed against.

Learned counsel urged that ground 2 of the grounds of appeal not having been couched in the manner of framing an omnibus ground of appeal in a civil case is incompetent and ought to be struck out on the authority of the case of Atuyeye v. Ashamu (1987) 1 NWLR (Pt.49) 269 at 280 – 281. Referring to issue No. 2, as formulated in the appellants’ brief, learned counsel submitted that the said issue is not related to or derived from any of the grounds of appeal and therefore incompetent citing, in support the cases of Momodu v. Momoh (1991) 1 NWLR (Pt. 169) p. 608 at p. 620 – 621 and Amadike v. Government of Imo State (1993) 2 NWLR (Pt. 275) 302 at p. 313.

Learned counsel for the plaintiffs/appellants did not file a reply brief to react to the preliminary objection and the court is constrained to hazard an opinion on the points agitated without the benefit of his assistance. Be that as it may, **it is judicially recognised that an omnibus ground of appeal in a criminal case is differently drafted from such a ground of appeal in a civil case. In a criminal case the essence of such a ground is that there is no evidence to support the verdict and therefore the omnibus ground in a criminal case is framed thus – “the verdict or judgment is unreasonable and cannot be supported having regard to the evidence”**; see Aladeasuru v. The Queen (1956) AC 49, B.P (West Africa) Ltd v. Akinola Allen (1962) 2 SCNLR

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In civil cases which are decided on the basis of preponderance or balance of evidence, the omnibus ground of appeal is simply that – “*the judgment is against the weight of evidence*”; See Akibu v. Opaleye & Anor (1974) 11 S.C. 189. However, it has been held that it is unobjectionable if such a complaint is couched as – “*the judgment is unreasonable, unwarranted and cannot be supported having regard to the weight of evidence.*” See the cases of Atuyeye v. Ashamu (1987) 1 NWLR (Pt.49) 267, Adeyeri v. Okobi (1997) 6 NWLR (Pt. 510) 534, Stephen Oteki v. Attorney-General, Bendel State (1986) 2 NWLR (Pt.24) 648 at 659. In case under consideration, ground 2 of the grounds of appeal already set out is for ease of reference repeated hereunder as follows:-

“2 *The order is unreasonable and unwarranted having regards (sic) to the facts.*”

On the authorities cited above, I agree with learned counsel for the defendants/respondents, that the ground as couched is more appropriate in a criminal than in a civil case. It is incompetent as it contravenes Order 8 rule 2 (4) of the Supreme Court rules. It is accordingly struck out.

With respect to the second arm of the objection relating to the second issue for determination, it is, no doubt, a correct statement of law that an issue for determination in an appeal which is not related to or derived from any of the grounds of appeal challenging the judgment appealed against is incompetent and must be discountenanced together with argument advanced thereunder in the consideration of the appeal. Authorities in this regard are legion and they include Okpala v. Ibeme (1989) 3 S.C. (Pt.1) 61; (1989) 2 NWLR (Pt.102) 208, Ehot v. The State (1993) 4 NWLR (Pt.290) 644, Din v. African Newspapers of Nig. Ltd (1990) 3 NWLR (Pt.139) 392 at 403, Idika v. Erisi (1988) 2 NWLR (Pt. 78) 563 and Madumere v. Okafor (1996) 4 NWLR (Pt.445) 637 to mention but a few. In case in hand, I am of the view that it is a misconception on the part of learned counsel for the defendants/respondents to contend, as he did, that

the second issue for determination is not related to any of the grounds of appeal.

A careful perusal of the first ground of appeal reveals that it is a complaint against the order non-suiting the plaintiffs/appellants, and made in substitution of the order of right of occupancy and injunction decreed in favour of the plaintiffs/appellants by the learned trial Judge. It therefore stands to reason that a complaint in ground one against the order of non-suit encompasses both the first issue for determination relating to declaration of title as well as the second issue dealing with the grant of injunction. Since it is against the practice of brief writing for one ground of appeal to be split into two issues, it would have been more appropriate for only one issue to be distilled from the first ground of appeal. Accordingly, I will merge and re-frame the 1st and 2nd issues thus:-

“Whether the learned justices of the Court of Appeal were justified in setting aside the judgment of the trial court and non-suiting the plaintiffs/appellants.”

This is in consonance with the lone issue for determination distilled in the respondents’ brief of argument, to wit:-

“Whether in the circumstances of this case the lower court was right when it set aside the orders of the High Court and in its stead entered an order non-suiting the plaintiffs; case.”

This formulation is wide enough to accommodate arguments on the judgment for declaration of title and grant of injunction made by the trial court in favour of the plaintiffs/appellants but set aside by the court below. In the light of the foregoing, I will overrule the preliminary objection with respect to the second issue for determination.

On the merits of this appeal, it seems to me that the bone of contention revolves on the identity of the land claimed by the plaintiff/appellants. Is it the yellow verge variously known as Ore village and Ore Akinde which forms an integral but an insignificant portion of the land in dispute verged red in the plaintiffs/appellants’ Plan Exhibit “B”? This issue has arisen because whereas the trial court gave judgment to the plaintiffs/appellants in respect of title over the entire area of land in dispute, the

Court of Appeal was of opinion that that judgment ought to be limited to the yellow verge, that is, Ore village as expressly stated on their writ of summons.

To ascertain the exact claim of a plaintiff in a suit, one generally must have recourse to the writ of summons and the claim as endorsed in the Statement of Claim., But just as in determining whether an averment in a particular paragraph of a Statement of Claim is traversed, one is not limited to a particular paragraph of the Statement of Defence but to the entire defence for which see Pan African Co. Lt. V. National Insurance Co. (Nig.) (1982) 9 S.C. 1, Titiloye v. Olupo (1991) 7 NWLR (Pt. 205) 519, Iga v. Amakiri (1976) 11 S.C., so by way of analogy, to ascertain the plaintiffs' claim, it is necessary to examine not only the writ of summons or the claim portion of the statement of claim but also other paragraphs of the Statement of Claim as well as plans filed along with the Statement of Claim. In this regard, I will refer to the claim as endorsed in the writ of summons, paragraphs 7 and 45 of the Statement of Claim filed in respect of the suit. They read as follows:-

Claim endorsed on the Writ of Summons

"1. Declaration that the plaintiffs are entitled to the right of occupancy over an area of land situate, lying and being at Ore village via Iju Otta, Ogun State.

2. N200 damages for trespass committed by the defendants by going on to the land in dispute and erecting a structure thereon.

3. An order of injunction restraining the defendants, their servants, agents and privies from committing any further acts of trespass on the land in dispute."

Paragraph 7 of the Statement of Claim

"The land in dispute is edged red in Plan No. LAT 118/OG84 drawn by L. Ademola Ashipa, Licensed Surveyor dated 16/3/84 and attached to this Statement of Claim"

Paragraph 45 of Statement of Claim

*"45.....
whereof the plaintiffs claim as per their writ of summons."*

The survey plain referred to in paragraph 7 of the Statement of Claim which was admitted in evidence by consent as Exhibit “B”, indicates that the land in dispute claimed by the plaintiffs/appellants is edged red and the land in dispute claimed by the plaintiffs/appellants is edged red and measures 2380 hectares and that a small area verged yellow in Ore village was the cause of action. Since the Plan Exhibit “B” is part of the Statement of Claim, a community reading of it together with the writ of summons leaves no one in doubt that the claims of the plaintiffs/appellants relate to the area verged red in Exhibit “B” and not to the yellow verge which is merely the cause of action. This is borne out from paragraphs 6, 9, 10, 11, 13, 14, 15 and 35 of the Statement of Claim which read, inter alia, thus: -

“6. *The land in dispute forms part of a larger area of land originally settled upon by Akowonwado who migrated from Ile Ife about 200 years ago.*

9. where Akowonwado settled became a village which was christened Oko Omi village

10. Akowonwado exercised various acts of ownership on the land he settled

11. When Akowonwado died all his land including the land in dispute was inherited by his children.

13. After the death of Akowonwado his children continued to live on the land in dispute.....

14. Generations after generations of plaintiffs’ family succeeded to the land in dispute until the present generation.

15. The plaintiffs have many villages on their land including the land in dispute. The villages include Oko Omi, Ilase, Ore Erinle, Oko Ilase now known as Olorunlepupo, Ilogbo, Akinlayo, Akinlayo, ??? same and others.

35. About a year ago the defendants without the consent of the plaintiffs’ family started to erect a church and some other structures near Ore village.”

It is pertinent to mention that all the villages referred to in paragraph 15 are within the area verged red in Exhibit “B”, that is the land in dispute.

From their own showing as portrayed in their Statement of Defence particularly paragraph 22 thereof, the defendants/respondents were not mistaken on the identity of the land claimed by the plaintiffs/appellants including the area that gave rise to the action. Paragraph 22 of their defence reads:-

22 The defendants admit erecting a church building at Ore Akinde without seeking permission or consent from the plaintiffs or anybody at all as the land in Ore Akinde and its environs marked "B" and edged Red in the Plan No. AK. 3051/09 of 23/6/83 prepared by D.O. Akingbogun licensed surveyor belong to the defendants family by virtue of their descendancy from Akinde the original founder of Ore Akinde village and owner of the land aforesaid. The area marked 'A' and edged Red on the said Plan which will be founded upon at the trial, is the land inherited by the defendants' family through their original ancestor Ogunyemi. The defendants family have since the times of Ogunyemi and Akinde his son occupied the two areas totaling 981 hectares, building, hunting, farming and exercising various other acts of ownership thereon without any let or hindrance until the recent acts of plaintiffs culminating in this return..."

The defendants/respondents' plan admitted as Exhibit C at the trial shows that the land in dispute edged red consists of two contiguous parcels of land marked respectively A and B.

The portion marked 'A' measures 757.400 hectares and includes the village of Ore Akinde. The defendants claim to have inherited that area by virtue of their descent from Akinde the son of Ogunyemi. The other portion marked "B" measures 223.200 hectares devolved on them from their great ancestor Ogunyemi. Although the defendants/respondents did not counter-claim, against the plaintiffs/appellants, they are no doubt laying claim on those parcels of land marked "A" and "B" in their survey plan Exhibit C. It is plain to me that the land in dispute which the Plaintiffs/Appellants claimed in their suit is the entire land edged red in their plan Exhibit "B" and not the land at Ore village verged yellow in Exhibit "B", which is merely the cause of action prompted by the erection of a church building thereon by the defendants/respondents without the permission of the plaintiffs/appellants.

Though the claim of the plaintiffs/appellants was inelegantly formulated, the attitude of the courts nowadays is to do substantial justice without undue adherence to technicalities. Justice can only be done if the substance of the matter is examined. Reliance on technicalities leads to injustice. See Nishizawa v. Jethwani (1984) 12 S.C. 231 at 279, Okaroh v. State (1990) 1 SCNJ 124 AT 130, Dr Okonjo v. Dr. Odje & Co. (1985) 10 S.C. 265 - 268, G.B. Ollivant Ltd. v. C.A. Vanderpuye (1964) 2 WACA 368 at 372, Nwosu v. Imo State Environmental Sanitation Authority (1990) 2 NWLR (Pt. 135) 688 at p. 717, Shuaibu v. Nigeria –Arab Bank Ltd. (1998) 4 S.C. 170; (1998) 5 NWLR (Pt. 551) 582 at 596.

As learned counsel for the plaintiffs/appellants correctly stated, parties did not properly join issue on the identity of the land claimed by the plaintiffs/appellants. A plaintiff seeking a declaration of title to land has the primary duty or burden to prove clearly and unequivocally the precise area to which his claim relates. But that burden will not arise where the identity of the land in dispute was never a question in issue. That issue will only arise where the defendant raises it in his Statement of Defence: See Ezeudu v. Obiagwu (1986) 2 NWLR (Pt.26) 208, Fatuade v. Onwoamanan (1990) 2 NWLR (Pt.132) 322.

The main issue that arose for resolution by the trial court was which of the parties proved a better title based on their competing traditional histories. The trial court addressed this issue admirably and state, inter alia, at pp 296, 300 and 302 thus:-

“Mr. Akintunde stated and agreed to by Mr. Latude that they both rely on traditional evidence to prove their cases; but if the court finds that the traditional evidence of both parties are inconclusive, then the court will have recourse to recent acts of possession and ownership and see which of the competing claims is more probable having regard to the evidence of such positive acts which equivocally point to exercise of ownership over the disputed land. See the cases of Kodjo v. Bonsie (1957) 1 WLR 1223 and Ekpo v. Ita 11 NLR.

My final view is that the traditional evidence as state in evidence

in court by the plaintiffs is more acceptable to me than those of the defendants...

If I ought to have found that there was conflict in the traditional evidence of both parties (I am convinced that there was none), let me examine the other aspects such as being in possession and performing such acts of ownership that will lead a reasonable mind to determine the true ownership of the land ...

By the features in Exhibit “B” and the defendants’ admission that the plaintiffs own and live at Oko-Omi, the plaintiffs would appear to me to own all the regions around Oko-Omi and edged red in Exhibit B which included Oko-Omi and the area in dispute edged yellow. Section 45 of the Evidence Act will operate in favour of the plaintiffs ...

Having so held, the onus is now on the defendants to show that the plaintiffs are not the owner. Section 145 of the Evidence Act refers. The defendants have not discharged that onus.”

The Court of Appeal in the leading judgment of Akintan, JCA., with which Onalaja and Adekeye, JJCA., concurred affirmed the above findings of the trial court when at page 444 of the record it held:-

“.... The learned trial court rightly found as a fact that plaintiffs proved their title to the entire land shown on their survey plan, Exhibit “B”. The plaintiffs also produced credible evidence that they have exercised control over the land since they inherited it from their ancestor. On the other hand, the defendants failed to convince the court about their claim of ownership of the enclave known as Ore Akinde village which is completely surrounded by the land which the plaintiffs were able to prove that they inherited from their ancestor. The only technical hitch that prevented the plaintiffs from having judgment was the disparity between their claim as phrased (sic) and the area of land they successfully proved as their own...

In the result, I believe that from the facts established in this case, this is a case in which an order of non-suit ought to be made.....”

The defendants/respondents have not appealed against those concurrent findings of fact and by implication they have accepted those findings to have been correctly made. Their only grouse is that the plain-

tiffs/appellants did not specially claim the entire area verged red in their plan Exhibit “B” over which right of occupancy was decreed in their favour. The court below accepted that contention and non-suited them. In my respectful view, that is erroneous.

B As I had pointed out earlier, from the writ of summons read in conjunction with the statement of claim including the survey plan Exhibit “B” it is plain to me that what the plaintiffs/appellants were claiming and upon which both parties joined issue was the land in dispute clearly delineated red in Exhibit “B”. It is that claim that the defendants/respondents defended and not just the yellow verge in Exhibit “B” and the concurrent findings of the two lower courts is that they are not entitled to that land. A non-suit is appropriate where there is no satisfactory evidence enabling the court to give judgment to either of the parties and wronging neither: See African Continental Bank v. Yesufu (1980) 1-2 S.C. 48, Olagbemiro v. Ajagungbade (1990) 3 NWLR (Pt. 136) 37. Since both courts below had decided that the plaintiffs/appellants established their title to the land in dispute, an order of non-suit cannot be justified.

Learned counsel for the defendants/respondents has adverted to paragraphs 39 and 40 of the Statement of Claim which he said disclosed that several portions of land at Ore village have been given to members of the defendant’s and plaintiffs families. He then submitted that as those grantees were not parties in the suit, plaintiffs/appellants would have failed in their claim. Similar submission was also made with respect to the portion of Ore village where the plaintiffs/appellants allowed the descendants of Akinde to farm. It was submitted that if the judgment of the trial court were allowed to stand, it would have the effect of depriving the descendants of Akinde the land granted to them.

With due respect to counsel, the persons or descendants of Akinde referred to have not complained. The defendants/respondent were sued in their personal capacity and it behooves counsel to confine himself to the case of his clients and not to offer unsolicited defence to parties who did not consult him. If those parties were aware of the case and decided not to be joined in the suit that is entirely their problem. Besides, if those

parties were granted land as customary tenants, radical title still resides in the plaintiffs/appellants entitling them to the declaration of customary right of occupancy granted in their favour.

The learned trial Judge appreciated that the defendants/respondents were occupying some portions of the land in dispute lawfully granted to them by the plaintiffs/appellants hence he limited the scope of injunction to the yellow verge in Exhibit "B" for in the concluding paragraph of his judgment, he said-

"They will also be entitled to an order of injunction against the defendants in respect of the area edged yellow in Exhibit "B".

An injunction can only be granted and binding when the boundaries of the area or areas to be affected are ascertained, well known and properly described: see the cases of Anthony Idesola & Anor v. Chief Paul Ordia (1997) 3 NWLR (Pt.491) 17 at p. 29, Epi v. Aigbedion (1972) 10 S.C. 53, (1972) 1 AII NLR (Pt.2) 370, Baruwa v. Ogunshola & Ors. 4 WACA 159, Omorie v. Idugiemwgnye (1985) 2 NWLR (Pt.5) 41.

In the case in hand, the court below was of the view that the land in Ore that gave rise to the dispute between the parties was not identifiable hence it refused to grant a declaration of right of occupancy of that area in favour of the plaintiffs/appellants even though it was satisfied that they had proved their entitlement thereto. It is conceded that the land in question was not demarcated by pillar beacons but it is edged yellow in Exhibit "B" depicting certain features that is, the church under construction. That church building is also reflected in Exhibit "C", the defendants/respondents plan. Undoubtedly, both parties know the land in question. Exhibit "B" was drawn to scale and there is no evidence on record that a Surveyor using the scale of the plan orientated at an origin indicated as O.N.N.O. cannot locate the yellow verge on Exhibit "B".

In the case of Amata v. Modekwu (1954) WACA 580 where a plan used in a previous suit in a claim for rent for farming was tendered in a subsequent suit for title, there was evidence that the plan was inaccurate and evidence so unsatisfactory that no judg-

ment could be founded on it. There was no such evidence in the instant case. For this reason, I am of the opinion that the court below was in error to have set aside the order of injunction made by the trial court. For this same reason, too, it was in error to have refused to grant right of occupancy to the plaintiffs/appellants in respect of the yellow verge which according to it was the area claimed in the writ of summons. Having opined that the plaintiffs'/appellants' claim related to the entire land in dispute verged Red in Exhibit "B" and that both parties fought and contested the action on that footing with the concurrent findings of the two lower courts in favour of the plaintiffs/appellants which findings have not been appealed against let alone faulted, it is my judgment that the order of the court below non-suiting the plaintiffs/appellants was misconceived and erroneous.

For the foregoing reasons this appeal succeeds and is accordingly allowed. The judgment of the court below is set aside and that of the trial court is restored. The plaintiffs/appellants are entitled to costs assessed and fixed at N10,000.00 against the defendants/respondents.

BELGORE JSC

I also allow this appeal for the reasons clearly given in the judgment of Edozie, JSC. I make the same orders as to costs.

MOHAMMED JSC

I have had the privilege of reading the judgment of my learned brother, Edozie, JSC., and I agree with him that this appeal had merit. For the reasons given in the lead judgment I too allow the appeal. I set aside the judgment of the Court of Appeal and restore that of the High Court. I also award N10,000.00 costs in favour of the appellants.

ONU JSC

Having been privileged to read in draft the judgment just delivered by my learned brother, Edozie, JSC., I agree with his reasoning and conclusion. I adopt the same as mine and have nothing further to add thereto.

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TOBI JSC

Where a plaintiff fails to adduce sufficient evidence on a crucial point in the matter, and where the state of evidence does not entitle the defendant to judgment, the proper order to make is one of non-suit. See Ode v. Trustees of Ibadan Diocese (1966) 1 AII NLR 287. The order of non-suit is to be granted where a plaintiff has only failed to get judgment on account of a mere technical hitch of which the defence is not, in the opinion of the court, entitled to take an advantage. See Odieta v. Okotie (1972) 6 S.C. 83; Ogunloye v. Durosinmi (1975) 12 S.C. 49; Okpaloka v. Umeh (1976) 9-10 S.C. 269.

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Where in a claim of declaration of title to land the plaintiff proves ownership of only a portion of the land claimed, the proper order to make is one of non-suit. See Ejiofor v. Onyekwe (1972) 12 S.C. 171. Non-suit may not be granted where a claim for declaration of title to land fails because the boundaries of the land are not ascertained; but where there is evidence that the plaintiff owns a part of the land the whole of which he failed to ascertain, non-suit may be granted. See Epi v. Aigbedion (1972) 10 S.C. 53. An order of non-suit should not be made when the effect of such order would be to penalise a plaintiff who maintained a continued consistency both in his pleadings and by the evidence in support thereof. See Ekpenyong v. Ayi (1973) 5 S.C. 169.

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In ordering a non-suit, the Court of Appeal said at page 444 of the Record:

“Applying the law as declared above to the facts of the instant case, the learned trial court rightly found as a fact that the plaintiffs proved their title to the entire land shown on their survey plan, Exhibit B. The plaintiffs also produced credible evidence that they have exercised control over the land since they inherited it from their ancestor. On the

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other hand, the defendants failed convince the court about their claim of ownership of the enclave known as Ore Akinde village which is completely surrounded by the land which the plaintiffs were able to prove that they inherited from their ancestor. The only technical hitch that prevented the plaintiffs from having judgment was the disparity between their claim as framed (sic) and the area of land they successfully proved as their own. There is no doubt therefore that it will be totally inequitable for their claim to be dismissed. This is because doing that will have the effect of not only preventing any future relief to the plaintiffs but will confer an undeserved legitimacy on the defendants of their act of illegally acquiring what has been shown not to belong to them. In the result, I believe that from the facts established in this case, this is a case in which an order of non-suit ought to be made.”

If the Court of Appeal agreed with the trial Judge, as it did, that “the plaintiffs proved their title to the entire land shown on their survey plan” and “also produced credible evidence that they have exercised control over the land since they inherited it from their ancestor”, there is, with respect, no legal basis for the order of non-suit. The appellants are entitled to judgment, as the learned trial Judge rightly held.

Burden or onus of proof presupposes the existence of a dispute. Accordingly, where there is no dispute, the parties are deemed to be ad idem, and proof of fact or facts in the pleadings no longer arises. I entirely agree with learned counsel for the appellants that the parties did not properly join issue on the identity of the land. The main issue was title to the land in dispute.

It is for the above reasons and the more comprehensive reasons given by my learned brother, Edozie, JSC., that I too allow the appeal. The judgment of the Court of Appeal is hereby set aside and that of the High Court restored. I also award N10,000.00 costs in favour of the appellants.

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